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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

PHILIP G.H. BENZENBERG,

Plaintiff,

v.

WILDA M. BURROUGHS et al.,

Defendants and Respondents,

GRANDVIEW PROPERTIES, INC.,

Claimant and Appellant.

F041196

(Super. Ct. No. 98-184644)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Melinda M. Reed, Judge.

Harry Pascuzzi and Susan M. Brown for Claimant and Appellant.

David P. Weaver, Jr., for Defendants and Respondent.

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Appellant Grandview Properties, Inc., appeals (Code Civ. Proc., § 720.420) from an order denying appellant's third party claim to certain real property located in Tulare County and subject to a writ of execution, in the amount of \$45,158.10, in favor of respondent Wilda M. Burroughs. The writ was based upon an abstract of judgment, dated September 20, 2000, which identified respondent as the judgment creditor and one Philip G. H. Benzenberg as the judgment debtor. Benzenberg had transferred the subject real property to appellant by means of two deeds, recorded in November 1999 and January 2000, respectively.

Appellant contends the trial court erred by denying appellant's third party claim because, upon Benzenberg's death prior to the issuance of the writ of execution, respondent was required to file a claim in Benzenberg's probate proceeding within one year of Benzenberg's death. (See Code Civ. Proc., § 686.020 [after the death of the judgment debtor, enforcement of a judgment against property in the judgment debtor's estate is governed by the applicable provisions of the Prob. Code]; Prob. Code, § 9300 [money judgments against the decedent are payable in the course of administration and are not enforceable against the estate property].)<sup>1</sup>

We will not address the issue because appellant did not first bring it to the attention of the trial court.<sup>2</sup> The appellate courts generally will not decide theories not raised in the trial court and instead presented for the first time on appeal. (*Brown v.*

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<sup>1</sup> Appellant also contends that, based upon Code of Civil Procedure section 366.2 (all actions on a liability of the debtor which survive the decedent's death, and which are not otherwise barred by the applicable statute of limitations at the time of the decedent's death, must be commenced within one year of the decedent's death), he would have a good defense to any probate claim by respondent to enforce her judgment. We find it unnecessary to consider this argument.

<sup>2</sup> Respondent pointed out in her brief that "appellant's other contentions [including that respondents were required to file a claim in the estate proceedings for Benzenberg] were not raised during the trial of this issue, but rather represent an attempt to overturn an adverse decision by raising new issues that were dreamed up for the first time after trial."

*Boren* (1999) 74 Cal.App.4th 1303, 1316.) The rule is based upon fairness to the trial court and the opposing party, as well as upon principles of estoppel and waiver. (See *Curcio v. Svanevik* (1984) 155 Cal.App.3d 955, 961.) The rule applies to new theories of liability (*Berioz v. Wahl* (2000) 84 Cal.App.4th 485, 498, fn. 9) as well as to new theories of defense (*Lucich v. City of Oakland* (1993) 19 Cal.App.4th 494, 498).

Nothing in the record before us includes any attempt by appellant, no matter how feeble, to present to the trial court the issue it now presents to us. Appellant's points and authorities filed in support of its third party claim raised two issues before the trial court -- (1) the abstract of judgment never attached to the property, and the property was not subject to execution, because the subject transfers of the property were complete before the abstract of judgment and the writ were issued; and (2) the value of the transferred property exceeded the amount of the underlying judgment. At the conclusion of the evidentiary hearing, counsel for appellant argued to the court only that "the abstract and the writ of execution were untimely." The trial court's ruling found against appellant, concluding that the abstract and the writ were timely and that, as respondent maintained, the transfer from Benzenberg to appellant was a fraudulent conveyance.<sup>3</sup> There is not a shred of mention, anywhere in the record, of the Probate Code or of any failure of respondent to comply with any Probate Code provision.

It is true that appellate courts may exercise their discretion to consider issues raised for the first time on appeal; usually, such issues involve pure questions of law which implicate matters of significant public policy or public interest. (*Resolution Trust Corp. v. Winslow* (1992) 9 Cal.App.4th 1799, 1810; *Mattco Forge, Inc v. Arthur Young*

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<sup>3</sup> Appellant does not challenge the trial court's finding that the transfer was a fraud upon Benzenberg's creditors. In effect, appellant concedes the transfers were void as to appellant and relies upon Benzenberg's legal retention of his ownership of the property to support the argument that respondent was required to file a claim in Benzenberg's estate proceeding.

& Co. (1997) 52 Cal.App.4th 820, 847 [“Only when the issue presented involves purely a legal question, on an *uncontroverted record and requires no factual determinations*, is it appropriate to address new theories”].) Here, in addition to the fact that appellant has not even extended to us the courtesy of asking us to exercise our discretion to consider the contention he advances, and while we might accept the fact Benzenberg died after the subject property transfers, there is no evidence in the record that Benzenberg had any estate subject to probate or, for that matter, that any probate proceeding with respect to Benzenberg had ever been initiated.<sup>4</sup> (See, e.g., Prob. Code, §§ 13150-13158 [court order determining succession to property as an alternative to probate].)<sup>5</sup> And, the issue raised by appellant does not involve any significant public policy or interest.

We also note Probate Code section 9303, which permits the enforcement, under the Enforcement of Judgments Law (Code Civ. Proc., 680.010) of an execution lien against the decedent’s property existing at the decedent’s death, and Probate Code section 9391, which permits the holder of a judgment lien against the decedent’s property to enforce the lien against the property without first filing a claim in the probate proceeding if the holder of the lien expressly waives all recourse to the other property in the estate.<sup>6</sup> Appellant’s neglect to mention or discuss in its brief either of these possibly applicable provisions of the Probate Code suppress any inclination we might have had to discretionarily decide the contention appellant has raised on this appeal; we are not about to do appellant’s legal research or frame arguments for it.

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<sup>4</sup> Respondent’s brief does state that *Benzenberg died soon* after the transfers were made. There are other references to the fact of his death in the reporter’s transcript. Appellant’s brief notes that Benzenberg died on “June 9, 2000.”

<sup>5</sup> There was testimony that Benzenberg was insolvent at the time of his death.

<sup>6</sup> Appellant’s third party claim is not a part of the record on appeal. We must therefore assume that it contained any necessary Probate Code section 9391 waiver.

For all the foregoing reasons, we decline to consider the arguments made by appellant for the first time on appeal.

**DISPOSITION**

The judgment (order) appealed from is affirmed. Respondent is awarded costs on appeal.

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Dibiaso, Acting P.J.

WE CONCUR:

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Vartabedian, J.

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Cornell, J.